Office - Supreme Court, U.S.
FILED
FEB 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-911

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
*Appellants,*

v.

ABE RODRIGUEZ, Director of the New Mexico Department of Alcoholic Beverage Control, *Appellee.*

**On Appeal From The Supreme Court Of The State Of New Mexico**

## APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

H. THOMAS AUSTERN*
WILLIAM H. ALLEN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
*Attorneys for Appellants United States Brewers Association, Inc., Adolph Coors Company, F & M Schaefer Brewing Company and Stroh Brewery Company and for Appellees Pabst Brewing Company and Olympia Brewing Company*

JEROME I. CHAPMAN*
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
WILLIAM S. DIXON
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
*Attorneys for Appellant Miller Brewing Company*

(List of counsel continued on inside cover)

*Counsel of Record

THOMAS J. WARD*
Ward, Lazarus, Grow & Cihlar
1711 N Street, N.W.
Washington, D.C. 20036
*Attorneys for Appellant*
*The Guiness-Harp Corporation*

HOWARD W. FOGT*
Foley, Lardner, Hollabaugh
& Jacobs
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
*Attorneys for Appellant*
*G. Heileman Brewing Company*

CHARLES W. DANIELS
Freedman, Boyd & Daniels
20 First Plaza, Suite 212
Albuquerque, New Mexico 87102
*Attorneys for All Appellants*
*except Miller Brewing Company*
*and for the Appellees*
*Joining in This Brief*

*Counsel of Record

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| *Bell* v. *Maryland*, 378 U.S. 226 (1964) | 2 |
| *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972) | 2 |
| *Dorchy* v. *Kansas*, 264 U.S. 286 (1924) | 2 |
| *Fusari* v. *Steinberg*, 419 U.S. 379 (1975) | 2 |
| *Healy* v. *United States Brewers Ass'n*, No. 82-1493 (Oct. 17, 1983), *affirming* 692 F.2d 275 (2d Cir. 1982) | 2, 5, 6 |
| *Johnson* v. *New York State Education Dept.*, 409 U.S. 75 (1972) | 3 |
| *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) | 2 |
| *Roth* v. *Delano*, 338 U.S. 226 (1949) | 2 |
| *Sanks* v. *Georgia*, 401 U.S. 144 (1971) | 2 |
| *Villa* v. *Van Schaick*, 299 U.S. 152 (1936) | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-911

UNITED STATES BREWERS ASSOCIATION, INC., *et al.*,
*Appellants,*

v.

ABE RODRIGUEZ, Director of the New Mexico Department of Alcoholic Beverage Control, *Appellee.*

**On Appeal From The Supreme Court Of The State Of New Mexico**

## APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM[1]

The premise of New Mexico's motion to dismiss or affirm is that, in a case in which only declaratory and injunctive relief was sought, the New Mexico Supreme Court knowingly restricted itself to passing on the constitutionality of a statute that had been repealed and replaced with another, very different statute. The conclusion is that this Court should render a decision on the merits sustaining the constitutionality of the repealed statute.

[1] This brief is filed on behalf of all the parties who joined in the Jurisdictional Statement herein. (Jur. St. *i*, n.1.) The statement required by Rule 28.1 appears as Appendix A to the Jurisdictional Statement.

This proposition cannot be reconciled with this Court's established practice, with good sense, or with statements in the New Mexico Supreme Court's opinion. The State's motion should therefore be denied, the judgment below should be vacated, and the case should be remanded to the New Mexico Supreme Court for further consideration in light of the 1981 price affirmation statute, which is now the law of New Mexico, and this Court's recent decision striking down a similar price affirmation statute in *Healy* v. *United States Brewers Ass'n*, No. 82-1493 (Oct. 17, 1983).

1. This Court has "long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law." *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964). *See also Fusari* v. *Steinberg*, 419 U.S. 379, 387 (1975); *Sanks* v. *Georgia*, 401 U.S. 144, 150-51 (1971); *Roth* v. *Delano*, 338 U.S. 226, 231 (1949); *Dorchy* v. *Kansas*, 264 U.S. 286, 289 (1924). When the constitutionality of a state statute is challenged, this Court has consistently held that it must review the judgment below in light of state law "as it now stands" and not as it stood at some prior stage in the litigation. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 52-53 (1980); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972). There is no reason to deviate from this practice here. In the present posture of the case, the Court should not attempt to pass on the constitutionality of either the 1981 New Mexico statute, which the New

Mexico Supreme Court has not yet clearly addressed, or the 1979 statute, which has been repealed.[2]

2. The State's motion mirrors the confusion in the opinion below as to precisely what the New Mexico Supreme Court was deciding. Uncertainty as to the basis for the judgment below is a further ground for vacating the judgment and remanding the case. *See Villa* v. *Van Schaick*, 299 U.S. 152, 155 (1936).

The New Mexico Supreme Court dismissed as too abstract the substantive arguments of the appellant brewers below. The court said, among other things, that by their arguments the brewers asked it to engage in speculation because the price affirmation statute whose constitutionality was challenged had been stayed throughout the litigation and there was therefore no "concrete case" in which to assess the Commerce Clause and antitrust reasons that appellants advanced for invalidating the statute. (Jur. St. 9b; *see also id.* at 11b-12b.) The court concluded its opinion by saying that the brewers "are not precluded from bringing a future action upon the showing that [their] case has become 'concrete'. . . ." (*Id.* at 14b.)

In moving to dismiss or affirm, New Mexico invites attention to these passages in its highest court's opinion.

---

[2] The question whether the constitutionality of the repealed 1979 statute is moot may itself turn on questions of state law, relating, among other things, to the interpretation of the brewers' undertakings at the time enforcement of the statute was initially enjoined and the impact of the statute's repeal on those undertakings. It is also appropriate to vacate the judgment and remand the case to the state court to permit it to determine, in the first instance, the issue of mootness. *Johnson* v. *New York State Education Dept.*, 409 U.S. 75 (1972).

saying that the court had permitted "appellants to raise these issues again in a 'concrete case' after enforcement when and if such case should arise . . . ." (Motion 6.) And it urges independently that the brewers are bound to await "a specific enforcement controversy" that will demonstrate "the factual consequences of the law." (*Id.* at 10.)

The court's invitation to further litigation to produce the "concrete case" thought lacking below, which the New Mexico Attorney General has renewed, is utterly inconsistent with the State's basic position on the motion to dismiss or affirm. That position, as we have said, is that the only subject of the decision below is the 1979 price affirmation statute originally challenged, which was repealed and replaced with the very different 1981 statute. The New Mexico Supreme Court could not have meant to invite further litigation concerning a statute no longer in effect. The Attorney General cannot be suggesting in his renewal of the invitation that the brewers should await a proceeding to enforce a statute that has been repealed and replaced with another statute.

There is no question of the relevance of the 1981 statute to this litigation. The problem is that the New Mexico Supreme Court has not dealt in terms with that highly relevant element of the litigation. The case should be remanded to accord that court the opportunity to do so.

3. New Mexico acknowledges the differences between the 1979 law and the 1981 law. In its motion it urges this Court in substance simply to disregard the differences on the ground that the 1981 statute was not before the New Mexico Supreme Court. Recognizing the frailty of that basic position, it also perfunctorily asserts that, in any event, the 1981 statute is distinguishable from the Connecticut price affirmation statute held unconstitu-

tional in *Healy* v. *United States Brewers Ass'n*, No. 82-1493 (Oct. 17, 1983), *affirming* 692 F.2d 275 (2d Cir. 1982), which on its face it appears to resemble. (Motion 9.)

Perhaps, if the statute were authoritatively construed by the New Mexico courts, such distinctions might appear. But the construction of the statute is for the New Mexico courts, not this Court.

To give the New Mexico Supreme Court the opportunity to consider the meaning of the 1981 statute, the impact of the repeal of the 1979 statute, and the applicability of this Court's decision in *Healy*, the judgment below should be vacated and the case remanded for the further consideration suggested in the jurisdictional statement. Certainly this Court should not dismiss or affirm, thereby ruling on the merits of a case the very issues in which are so murky.

## CONCLUSION

It is respectfully submitted that the judgment of the New Mexico Supreme Court should be vacated and the case should be remanded for further consideration in light of the 1981 amendments to the New Mexico price affirmation law and this Court's decision in *Healy* v. *United States Brewers Ass'n*, No. 82-1493, 104 S.Ct. 265 (1983).

Respectfully submitted,

H. THOMAS AUSTERN
WILLIAM H. ALLEN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
*Attorneys for Appellants United States Brewers Association, Inc., Adolph Coors Company, F & M Schaefer Brewing Company and Stroh Brewery Company and for Appellees Pabst Brewing Company and Olympia Brewing Company*

THOMAS J. WARD
Ward, Lazarus, Grow & Cihlar
1711 N Street, N.W.
Washington, D.C. 20036
*Attorneys for Appellant The Guiness-Harp Corporation*

JEROME I. CHAPMAN
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

WILLIAM S. DIXON
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
*Attorneys for Appellant Miller Brewing Company*

HOWARD W. FOGT
Foley, Lardner, Hollabaugh & Jacobs
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
*Attorneys for Appellant G. Heileman Brewing Company*

CHARLES W. DANIELS
Freedman, Boyd & Daniels
20 First Plaza, Suite 212
Albuquerque, New Mexico 87102
*Attorneys for All Appellants except Miller Brewing Company and for the Appellees Joining in This Brief*

February 3, 1984